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Supreme Court of the United States

OCTOBER TERM, 1902.

Number 234.

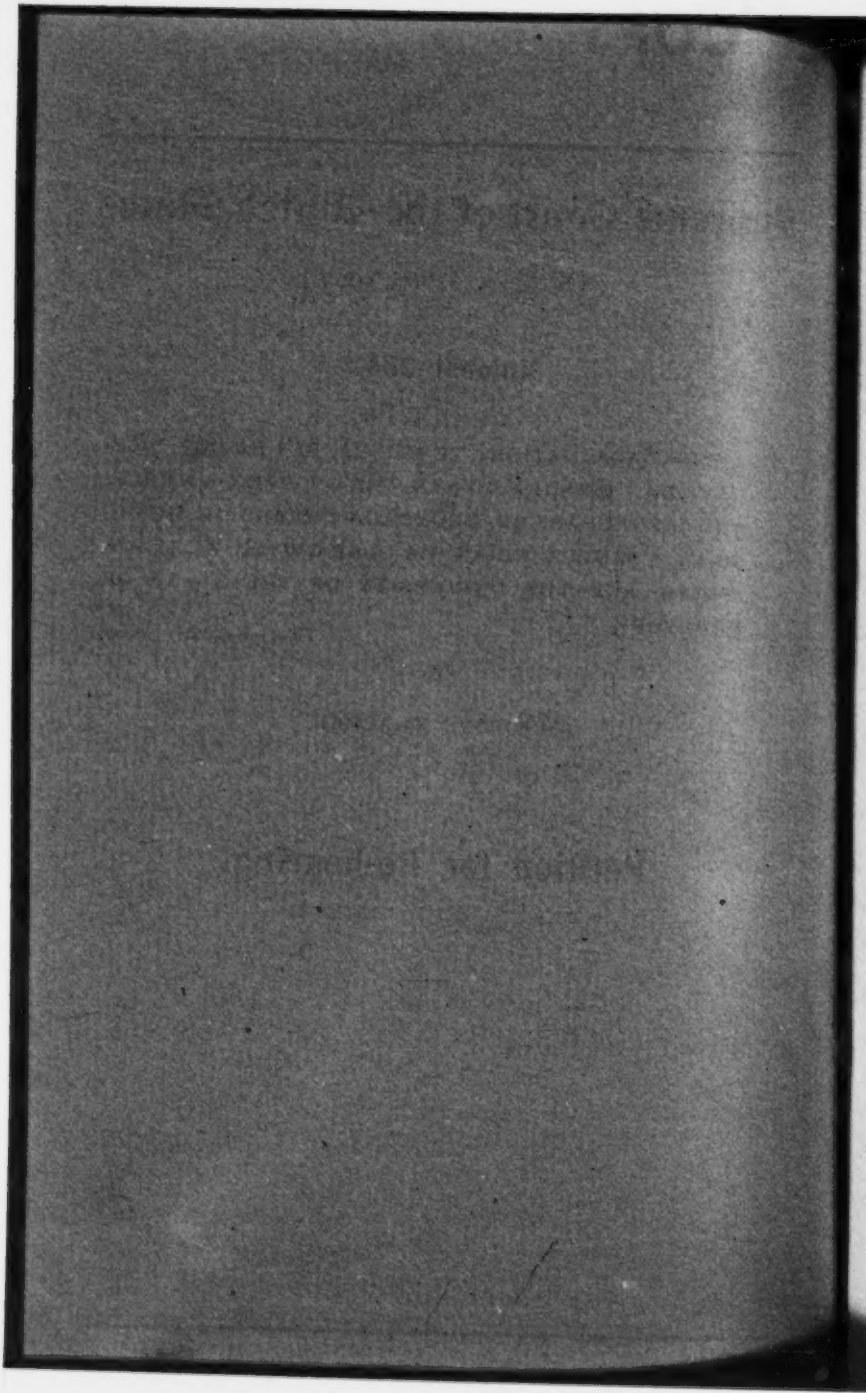
THE ONONDAGA NATION; TE-HES-HA, SAY-HA-QUE, HOS-HAY-QUA, SHO HEH-DO-NAH, HA-ON-WEH-GO-WEHLE, AND JARVIS FARMER, ONONDAGA INDIANS; HO-DO-OH-GO-AH, A SENECA INDIAN; HA-JA-AH-GWYSH, A CAYUGA INDIAN, AND THE UNIVERSITY OF THE STATE OF NEW YORK,

Plaintiffs in Error,

VS.

JOHN BOYD THACHER.

Petition for Re-hearing.



A PETITION BY THE PLAINTIFFS IN ERROR FOR A RE-HEARING.

The Court says:

"Certainly the Court of Appeals of New York did not "suppose that a Federal question was lurking in the "record presented for its consideration."

"In any event, as we find that the claim of Federal "right was not especially set up or called to the attention "of the State court in any way, we are without jurisdic- "tion to review the judgment of the State court. (*Tellu- "ride Power Transmission Co.* v. *Rio Grande Western "Railway Co.*, 187 U. S., 569, 580."

The judiciary act—(James Duane's, 1789)—says that to give the Court jurisdiction there must be something "specially claimed or set up"—under the constitution or

a treaty—but it is to be in the *highest* court of the State, that it is to be set up (1 Folwell, 64). As the words have gone into the Revised Statutes they are a little changed, but as follows:

R. S., 1878, p. 133:

"Sec. 709. A final judgment or decree in any suit *in* "*the* HIGHEST *court of a State, in which a decision in the* "*suit could be had*, where is drawn in question the valid- "ity of a treaty or statute of, or an authority exercised "under, the United States, and the decision is against "their validity, or where is drawn in question the valid- "ity of a statute of, or an authority exercised under "any State, on the ground of their being repugnant to "the Constitution, treaties or laws of the United States, "and the decision is in favor of their validity; or *where* "*any title, right, privilege, or immunity is claimed* "*under the Constitution, or any* TREATY *or statute of, or* "*commission held or authority exercised under, the* "*United States, and the decision is against the title,* "*right, privilege, or immunity* SPECIALLY SET UP OR "CLAIMED by either party, *under such Constitution,* "TREATY, *statute, commission, or authority*, may be re- "examined and reversed or affirmed in the Supreme "Court upon writ of error."

As the Court of Appeals of New York, which is the highest Court of the State in this action, does not use pleadings—it follows that the Federal question need not be set up in a pleading.

I.

The Federal Question was "specially set up" *and* "claimed" in the Court of Appeals of New York.

At page two hundred and ten of the record is the following:

"It is stipulated that the foregoing 'excerpts' from the "briefs 'for the appellants' may be added to the record in "the Supreme Court of the United States and that the "points therein were taken in the State court and thus "*is* a part of the record."

These "excerpts" are *first*—the treaty of 1794 (R., 203–206), of which one of the wampums is the Indian record.

Next the appropriation act of 1901 (R., 206), which shows that the political department of the Government was then recognizing the being of the Six Nations and of the Onondaga Nation.

Next the case of the "*New York Indians*" (6 Wall. 761) in which the Court, speaking by Mr. Justice Nelson, said (1866) that the treaties—with the Six Nations and the Onondagas—beginning *1784* (before the Constitution) and ending 1842, were the Supreme law of the land (R., 202, 5 Wall. 764). Next the case of the *Kansas Indians* (5 Wall. 757), in which the Court, speaking by Mr. Justice Davis and of Indians in like cases:

"*As long as the United States recognises their national* "*character they are under the protection of treaties and* "*the laws of Congress*, and their property is withdrawn "from the operation of State laws" (R., 201).

There is also—the Constitution of the Onondagas—that it had the keeping of the wampum records and that its council told the University of the State of New York to keep the wampum records.

The Federal Question—*if there be one*—was then "specially set up and claimed."

It is true that the Court of Appeals of New York said nothing about it. Why, I do not know, but it certainly was not for the want of having been told about.

II.

There is a Federal Question.

The national existence—the powers of self-government—and the right to protect their property are all guaranteed by the treaties.

What good is the recognition of the national existence by the Government if anybody can take the property of the nation and walk off with it and then defiantly stand up in the Court and say that the nation has not got the *power* to put it in a safe deposit company for safe keeping?

I submit that it *has* got the power to put the national property—for safe keeping—in a safe deposit company, and that that power is confirmed to it by the treaties which are "historical" and "the supreme law of the "land," the first of them (1784) having been "*adopted* "*and sanctioned*" by the CONSTITUTION.

"' * * * The very term "nation," so generally "' applied to them, means a "people distinct from "' "others." The Constitution, by declaring treaties "' already made, as well as those to be made, to be the "' supreme law of the land, has adopted and sanctioned "' the previous treaties with the Indian nations, and "' consequently admits their rank among those powers "' who are capable of making treaties.'

"In reviewing the whole subject in *Kagama* v. *United* "*States*, 118 U. S., 375, this court said (p. 381):

"' With the Indians themselves these relations are "' difficult to define. They were, and always have been, "' regarded as having a semi-independent position when "' they preserved their tribal relations; not as States, "' not as nations, not as possessed of the full attributes "' of sovereignty, but as a separate people with *the* "' *power of regulating their internal and social rela-* "' *tions*, and thus far not brought under the laws of the "' Union, *or of the State within whose limits they* "' *resided*.'

(Talton *v.* Myers, 163 U. S., 376, 383, the Court, speaking by Mr. Justice White and quoting Mr. Chief Justice Marshall.)

As the Government *thus* confirms the "power of regu- "lating their internal relations"—the right of the Govern- ment of the Onondagas to put the personal property, held in trust by that "nation," in a safe deposit company is a "*right, privilege* AND IMMUNITY claimed under the Con- "stitution," AND *four* treaties.

III.

The Findings.

Mr. Justice Harlan said that the rule as to findings of fact was different in cases which come from a State court from what it is in cases which come from a Federal court —in that in the latter case the Court will not be bound by a finding which is against evidence, while in the former case it will: and, the Court, speaking by Mr. Justice Peckham, has quite lately and formally said the same thing.

This however is not any matter of embarrassment.

By the law of New York a finding, though it be *in form* of fact, is, if there be not any evidence under it, NOT *a finding of fact, but an* ERROR OF LAW, which can be excepted to and is cognizable in the Court of Appeals of New York—the jurisdiction of which is, by the Constitution of New York,—*only* of matters of law.

The Court, of course, sits as does the Court of Appeals of New York, otherwise, *of what* GOOD *is the writ of error?*

Thus, though there is in the record a finding in *form* of *fact* that Mr. Thacher owns the wampum records,—since it has under it not any evidence *except* the evidence of Webster's *possession*, which it is *quite* plain is not any evidence at all, it is NOT a *finding of* FACT, but *an* ERROR *of* LAW.

It is quite plain from the record that Mr. Thacher is keeping things which do not belong to him by the use of what by the Common Law—the Common Law is in force in New York—are called "unmeritorious" defenses.

The Ho-de-no-sau-nee are doing very well. They are entirely respectable, quite prosperous, and need and want only to be let alone (R. 91). Every year—about, somebody tries to get their land. This year a bill to divide up the Senecas' land really got through the House. Mr. Vreeland, the Member of Congress from the district where their land is, tried it.

It is quite a pity that they have not even sufficient *being* to put their records in a safe deposit company or some such a place—so that somebody who comes and takes it away cannot be made to give it back.

AS-QUE-SENT-WAH
(EDWARD WINSLOW PAIGE).

I certify that this is not for delay.

EDWARD WINSLOW PAIGE,
Of Counsel.

In the *United States* v. *Kagama*, 118 U. S. 375, the Court, speaking by Mr. Justice Miller, said (p. 383):

"These Indian tribes ARE the wards of the nation. "They are communities *dependent* on the United States. "Dependent largely for their daily food. Dependent for "their political rights. *They owe no allegiance to the "States, and receive from them no protection.* Because "of the local ill-feeling, the people of the States where "they are found are often their deadliest enemies. From "their very weakness and helplessness so largely due to "the course of dealing of the Federal Government with "them and the treaties in which it has been promised, "there arises the duty of protection and with it the power. "This has always been recognized by the Executive and "by Congress, and by this court, whenever the question has arisen."